IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CA' DE BE' IMPORTS, INC.,	**:**	**CIVIL ACTION**
Plaintiff	**:**	
v.	**:**	
	:	
ZIM-AMERICAN ISRAELI SHIPPING	**:**	
COMPANY, INC., GIORGIO GORI,	**:**	
SRL, AND GIORGIO GORI USA, INC.,	**:**	
Defendants	**:**	**No. 02-6710**

Findings of Fact, Conclusions of Law and Verdict of the Court

Gene E.K. Pratter, J. **January 4, 2006**

INTRODUCTION

In this case, Plaintiff, Ca' de Be' Imports, Inc. ("Ca' de Be'"), commenced this non-jury case and claimed various causes of action against Giorgio Gori, SRL and Giorgio Gori, USA (collectively, "Gori") and Zim American Israeli Shipping Company ("Zim American"), alleging that one or more of the defendants were liable for the complete loss of value in a shipment of Italian wine that Ca' de Be' arranged to import into the United States for resale. This Court granted in part and denied in part two Motions for Summary Judgment filed by Zim American and the Gori Defendants prior to the time of trial. The Court granted judgment in favor of Zim American with respect to all counts against it, and granted partial judgment in favor of the Gori Defendants as to a count alleging fraud and misrepresentation. The remaining claims against the Gori Defendants for trial were: (1) breach of contract; (2) negligence; and (3) negligent misrepresentation. As plaintiff, Ca' de Be' bears the burden of proving each of these claims by a preponderance of the evidence.

A non-jury trial of began on June 7, 2005, at which time Ca' de Be' presented its case in chief, consisting of a presentation of one witness, Franco Faggi, who previously owned an interest in Ca' de Be' and acted as the general manager of the company at the time of the incident underlying the present dispute. At the conclusion of Ca de' Be's presentation of its case on direct, counsel for Gori orally moved for judgment on the evidence presented. The Court directed that the Motion be submitted in writing, and counsel for Gori submitted a brief in support of the Motion on July 5, 2005. The Motion was denied by Order of this Court on August 17, 2005, and the bench trial resumed on September 16, 2005, with the presentation of the testimony of one witness on behalf of the Gori Defendants, James G. Maher. The parties have been given considerable time to submit legal briefs to support their respective positions. The Court's findings, conclusions and verdict are set forth below.

JURISDICTION

Jurisdiction in this case is appropriate pursuant to 28 U.S.C. § 1332 because the parties are diverse and the amount in controversy exceeds $75,000. Ca' de Be' is a Pennsylvania corporation with a principal place of business in King of Prussia. Giorgio Gori, Srl, is an Italian corporation with a place of business in Hoboken, New Jersey, and Giorgio Gori, USA, Inc. is a Delaware corporation with a place of business in Hoboken, New Jersey.

FINDINGS OF FACT

1. Ca' de Be' is a corporation with its principal place of business located in this judicial district. At all times relevant to this dispute, Ca' de Be' was a distributor of Italian wines, holding an importer's license from the Pennsylvania Liquor Control Board. Ca' de Be'

purchased its wine directly from the Italian wineries and imported them into the United States by ocean transport. Stipulated Fact, June 7, 2005 Trial Trans. ("June Tr.") at 25:6-12.

2. Franco Faggi and his wife formed Ca' de Be' in approximately 1996, and began to import wine from Italy into the United States some time during 1997. As a general practice, Ca' de Be' ordered various amounts of wine from different Italian suppliers that, in the aggregate, typically would be enough to fill a 40-foot ocean container. Stipulated Fact, June Tr. at 25:13-18.

3. Ca' de Be' generally engaged the services of a consolidator/freight forwarder to arrange for the transportation of the wines it purchased from the wineries to the point of consolidation (usually the consolidator's facility) where the cases of wine were loaded onto pallets and into an ocean container. The consolidator/freight forwarder booked the container with an ocean carrier for transport to the United States and arranged for delivery of the loaded container to the Italian port for consolidation with other shipments for others. Stipulated Fact, June Tr. at 25:18-25; 26:1-2.

4. From 1997 through 1999, Ca' de Be' engaged Savino del Bene, now known as Albantrans, as its consolidator/freight forwarder. In its dealings with Savino del Bene, Ca' de Be' insured its wine shipments through the freight forwarder. However, Mr. Faggi did not know what risks were covered by this insurance. Stipulated Fact, June Tr. at 26:3-8.

5. In 1999, Mr. Faggi attended a wine show in Verona, Italy and visited the Giorgio Gori exhibition booth. Shortly thereafter, Mr. Faggi contacted Gori with respect to acting as Ca' de Be's consolidator/freight forwarder. Stipulated Fact, June Tr. at 26:9-13.

6. Mr. Faggi did not discuss freight insurance with the Gori representative during the meeting at the exhibition. June Tr. at 89:14-18. Mr. Faggi did, however, later make a general inquiry of a Gori representative as to whether the wine was insured and recalls being given a general answer that Gori "would cover everything." June Tr. at 39:7-15; 92:14-16. Mr. Faggi did not make a further inquiry as to the specific types of risk that would be covered or what types of situations might be excepted from insurance, did not request or receive a copy of the insurance policy, and did not inquire as to whether there would be an additional cost imposed by Gori to insure the shipment. June Tr. at 39:23-25; 40:1-2; 94:20-25; 95:1-4; 126:23-25; 127:1-16.

7. Mr. Faggi stated that the reason he chose to utilize the services of Giorgio Gori was that "[m]ost of the shipments – most of the wine shipments out of Italy, they are made through [Gori]. It is one of the major consolidator and freight forwarder (sic) when it comes to wine, so that is the reason why I opted to go with them." Stipulated Fact, June Tr. at 26:13-19.

8. Mr. Faggi's contact with Gori was Fulvio Bosca, an employee of Gori who worked out of Gori's New Jersey office. Stipulated Fact, June Tr. at 26:17-19.

9. There was no written agreement between Ca' de Be' and Gori defining the parties' obligations, undertakings or expectations. June Tr. at 48:18-20. As a general practice, Mr. Faggi would line up his shipments by placing his orders with various vineyards and then send Gori, through fax or email, the details of the proposed shipment, including copies of the purchase orders. Stipulated Fact, June Tr. at 26:20-22.

10. Mr. Faggi would also inform the suppliers that Gori would act as the consolidator

and freight forwarder, leaving Gori and the suppliers to coordinate the delivery of the wine to the consolidation point. Stipulated Fact, June Tr. at 26:22-25; 27:1-2. Gori would then book the shipment with an ocean carrier and pack the shipment into the container, which would be transported to the port and loaded onto the ship. Stipulated Fact, June Tr. at 27:2-5.

11. Finally, Gori would send Mr. Faggi a shipping notice informing him (1) that the container was loaded, (2) the identity of the vessel on which it was being shipped, and (3) the estimated date of departure and the estimated date of its arrival. Stipulated Fact, June Tr. at 27:5-9.

12. Wine is a temperature sensitive commodity; if it becomes too hot it will spoil, and if it becomes too cold it will be ruined. Stipulated Fact, June Tr. at 27:10-12. To maintain its quality, wine should be shipped at between approximately 56 and 58 degrees Fahrenheit. Stipulated Fact, June Tr. at 27:12-14. Accordingly, depending on the season during which a shipment occurs, care is taken when shipping wine to protect it against temperature fluctuations. Stipulated Fact, June Tr. at 27:15-21.

13. Ca' de Be' had three container options available for shipping its wine, including use of (1) a "dry container," which is an uninsulated ocean container with no temperature protection; (2) a "non-operating reefer," which is an insulated container with a refrigeration unit that is not in use; or (3) a "reefer container," which is an insulated container with an operating refrigeration unit. Stipulated Fact, June Tr. at 28:1-7.

14. The first time Ca' de Be' used a reefer container to ship wine was at the

suggestion of Gori. Stipulated Fact, June Tr. at 28:9-12. Mr. Faggi stated that the reason for use of this type of container was that it was "the norm in the business." Stipulated Fact, June Tr. at 28:12-13.[1]

15. When shipping the wine with Gori, Mr. Faggi was aware of the need to obtain insurance to protect the cargo from loss. Stipulated Fact, June Tr. at 28:18-19.

16. The shipment of wine involved in the present dispute consisted of 1,588 cases of wine from several different producers, including Altesino, Montevertine, Bruno Giacosa and Castello Banfi. Plaintiff's Exs. 1 and 6.

17. The wine was consolidated and containerized and departed Livorno, Italy on or about August 7, 2001 on the vessel Nord Eagle for arrival in the Port of New York (Maher Terminal at Port Elizabeth, New Jersey) on approximately August 20, 2001. Stipulated Fact, June Tr. at 28:20-23.

18. On August 6, 2001, Zim Israeli Navigation Company, Ltd. ("Zim Israeli") issued Sea Waybill Number ZIMULVN 112350 (the "Sea Waybill"), which was associated with the Ca' de Be' shipment. Plaintiff's Ex. 6. The Sea Waybill listed "CIV-Giorgio Gori as Agents SC A-2995 'Freight Forwarder'" as the Shipper/Exporter and Ca' De Be' Imports, Inc. as the Consignee. Id.

19. Payment of $5,435.70 for all services associated with the shipment of the wine

[1] Mr. Faggi further stated that "usually you have the – the freight forwarder try to steer you and suggest [to] you and give you options [and] suggestion[s] on what needs to be done, but it's pretty much the norm in this business to use a refrigerated container during hot weather." Stipulated Fact at June Tr. at 28:13-17.

was made on August 24, 2001 to Zim-American, which was the American agent for Zim Israeli. Plaintiff's Ex. 10. Of the funds paid to Zim-American, $1,940.70 was then paid to Gori.[2] June Tr. at 18:12-20; Plaintiff's Ex. 9.

20. William Parker Associates, a trucking firm hired by Ca' de Be', picked the container up on August 27, 2001 at the Port Elizabeth Terminal and delivered it to Ca' de Be's Philadelphia facility on the same day. Stipulated Fact, June Tr. at 28:24-25; 29:1. The wine was frozen solid at the time it was unloaded from the container on August 27, 2001, and it all appeared to have been frozen for a period of time. Stipulated Fact, June Tr. at 29:1- 4.

CONCLUSIONS OF LAW

A. **Breach of Contract Claim**

1. Initially, Ca' de Be' asserted that the Gori defendants had breached their contractual obligations to Ca' de Be' by "failing to maintain the temperature within the [storage] container at a constant temperature of 14 degrees centigrade." Complaint at ¶ 18. No claim was asserted against either of the Gori defendants pursuant to the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300 et seq., or the Ocean Shipping Reform Act, 46 App. U.S.C. §§ 1701 et seq. ("OSRA").

2. During the course of the litigation, Ca' de Be' modified its positions to assert also or alternatively that the Gori defendants' contractual liability arises from obligations the Gori defendants had as a common carrier. Plaintiff's Trial Memorandum at 8.

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[2] $1,787.00 was paid to Gori for C.O.D. charges and another $153.70 was paid as a commission. June Tr. at 18:12-20; Plaintiff's Ex. 9.

3. The Court concludes that Ca' de Be' did not provide sufficient evidence to permit the conclusion that the Gori defendants are liable under either theory.

(a) Contractual Liability

4. Ca' de Be's original argument, namely, that the Gori defendants breached their agreement with Ca' de Be' by failing to maintain the proper temperature in the container, fails because there is no evidence on the record from which the Court could conclude that the Gori defendants agreed to bear this obligation. Under Pennsylvania law,[3] a plaintiff asserting a breach of contract claim must establish (1) the existence of a contract, including its essential terms (i.e., the parties' obligations); (2) a breach of a duty imposed by the contract; and (3) resulting damages. See, e.g., Hart v. Arnold, 884 A.2d 316, 332 (Pa. Super. Ct. 2005).

5. Where the obligations assumed by a party to a contract are not clear, Pennsylvania courts will strive to "ascertain and give effect to the intent of the contracting parties;" other courts would interpret the terms "according to the meaning that would be ascribed to them by a reasonable third party." See Hart, 884 A.2d at 332.

6. The Court concludes that Ca' de Be' has not established by a preponderance of the evidence that the Gori defendants agreed to maintain (or to be legally responsible for another to maintain) the container at the proper temperature while the wine was contained in it. At trial, there was sparse testimony presented with respect to what the parties intended to be the terms of their contract for transporting the wine from Italy to the United States. Mr. Faggi testified that

[3] The parties implicitly agree that Pennsylvania law would apply to resolve this dispute. Both Gori and Ca' de Be', in their respective submissions, cite to Pennsylvania law as being authoritative.

the Gori representatives probably instructed him to use a refrigerated container to ship wine during the summer months since it would be logical to do so, but Mr. Faggi also acknowledged that using a refrigerated container to ship wine at that time of year was logical. June Tr. at 42:19-24.

7. Despite opportunity to do so, Mr. Faggi did not testify that as part of the agreement with Gori, Gori undertook to determine the appropriate temperature in the container in which the wine was shipped or to make sure that that temperature would be maintained.

8. Additionally, Ca' de Be' did not establish by a preponderance of the evidence that the parties each understood the terms of the contract to include insurance coverage for a malfunction or other problem with the temperature of the storage container. From the evidence presented, it is impossible for the Court to draw any conclusions with respect to Gori's understanding of the obligations it was undertaking by agreeing to arrange for the shipment of Ca' de Be's wine because Ca' de Be' presented no witnesses to testify as to what Gori (or any party in Gori's position) perceived the contract to include. There was no evidence from which to deduce any custom and practice on this issue. Although Mr. Faggi testified that during his conversations with a Gori representative he was told that Gori "would cover everything," Mr. Faggi did not ask to see even a sample insurance policy and did not request any further elaboration with respect to exactly what types of risks were or were not covered. June Tr. at 95:1-4.[4] Apparently, Mr. Faggi asked no questions about the supposed insurance.

[4] As an importer, Mr. Faggi's business is to purchase wine and find a way to arrange its shipment to the United States. As such, Mr. Faggi is sufficiently sophisticated with respect to the logistics of his business to have understood the need for insurance that would cover the risks to

9. There was no testimony elicited from any Gori representative with respect to Gori's intent in negotiating the contract. Mr. Faggi's recollection under oath of the responsibilities discussed with, much less actually assumed or disclaimed by Gori, was decidedly general, unclear, and bordered on being so vague as to be entirely unhelpful in terms of satisfying the Court of the contours of the contract between Ca' de Be' and Gori. Ca' de Be' did not present sufficient evidence from which the Court could conclude that Gori intended to take responsibility for maintaining the temperature in the storage container while the wine was in transit or could even appreciate that Ca' de Be' may have had such an expectation.

(b) Liability as a Non-vessel Operating Common Carrier

10. Later in the litigation,[5] Ca' de Be' modified its argument to assert that Gori acted as an "ocean transportation intermediary," thereby assuming a statutory duty to ensure the safe delivery of the wine shipment. To determine whether Gori is liable for breaching its contract with Ca' de Be' on this basis, the Court must determine whether Ca' de Be' presented sufficient evidence from which the Court can conclude that Gori acted in such a role.

11. Because Gori did not own the ship on which the wine was carried, any liability Gori has as a carrier would have to arise from a role as an ocean transportation intermediary as that term is defined under OSRA.

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which Ca' de Be's wine would be subjected. At the very least, an additional inquiry with respect to what, if any, policy exclusions existed would have been appropriate in this context.

[5] Ca' de Be' did not begin to pursue its argument with respect to the Gori defendants' status under OSRA until after summary judgment in favor of Zim American was granted. In Ca' De Be's complaint, the only statutory maritime claim that it asserted was a claim under the Carriage of Goods by Sea Act against Zim American.

12. Under OSRA, an "ocean transportation intermediary" is "an ocean freight forwarder or a non-vessel-operating common carrier." 46 App. U.S.C. § 1702(17). In turn, an "ocean freight forwarder" is a person that "in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers, and processes the documentation or performs related activities incident to those shipments." 46 App. U.S.C. § 1702(17)(A).

13. In contrast, a party acting as a freight forwarder is one that simply arranges for the transportation of goods and handling the details of a shipment as an agent of the shipper and is liable to the shipper only for its own negligence, including negligence in selecting a carrier. Chicago, Milwaukee, St. Paul & Pac. R. Co. v. Acme Fast Freight, Inc., 336 U.S. 465, 484-85 (1949). One indicator of this type of arrangement is that the shipper pays a fee for the forwarder's services in addition to the freight charges of the carrier used for the actual transport of the goods. Id.

14. Alternatively, a "non-vessel-operating common carrier" is "a common carrier that does not operate the vessel by which the ocean transportation is provided, *and is a shipper in its relationship* with an ocean common carrier." 46 App. U.S.C. § 1702(17)(A). (emphasis added). An ocean transportation intermediary *acting as a shipper* is one that "accepts responsibility for payment of all charges applicable under the tariff or service contract." 46 App. U.S.C. § 1702(21)(E).

15. A party acting as a non-vessel operating common carrier serves a different

function than that of a typical freight forwarder. Regardless of the title it assumes, a party that promises to deliver goods safely to their ultimate destination and charges a rate covering the entire transportation bears a heavier burden, and, therefore, may be held liable to the shipper should the goods be damaged or lost in transit. Chicago, Milwaukee, St. Paul & Pac. R. Co., 336 U.S. at 484-85.

16. The burden of demonstrating that a party calling itself a freight forwarder has actually acted as a carrier rests on the party seeking to establish that fact. Prima U.S. Inc. v. Panalpina, Inc., 223 F.3d 126, 130 n.1 (2d Cir. 2000).[6] To discern whether a party has acted as an ocean freight forwarder or a non-vessel operating common carrier, a court may consider the following factors: "(1) the way the party's obligation is expressed in documents pertaining to the agreement; (2) the history of dealings between the parties; (3) issuance of a bill of lading; and (4) how the party made its profit and, in particular, whether the party acted as 'agent of the shipper . . . procuring transportation by carrier and handling the details of shipment' for fees 'which the shipper paid in addition to the freight charges of the carrier utilized for the actual transportation'". Zima Corp. v. M.V. Roman Pazinski, 493 F. Supp. 268, 273 (S.D.N.Y. 1980) (quoting Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Acme Fast Freight, Inc., 336 U.S. 465, 484 (1949)).

17. Ca' de Be' argued that the evidence it presented demonstrated in three ways that

[6] The Court notes that the Court of Appeals for the Third Circuit has not directly addressed this issue. However, the burden allocation analysis of the Second Circuit Court of Appeals and other cases decided pursuant to the Supreme Court's Acme Fast Freight opinion persuade the Court that the burden on this issue properly rests with the party seeking to impose liability upon another.

Giorgio Gori acted as more than a mere freight forwarder. First, Ca' de Be' argued that a representative of either one or both of the Giorgio Gori defendants promised the safe delivery of the wine, thereby establishing the oral understanding between the parties. Sept. 16, 2005 Trial Trans. ("Sept. Tr.") at 11:17-21. Second, Ca' de Be' argued that this assertion is supported by the fact that Gori did the "heavy lifting" with respect to the shipment, completing tasks that would be inconsistent with those completed by a mere freight forwarder, such as transporting the wine from the producers and packing it into the container for shipment. Sept. Tr. at 11:21-23. Finally, Ca' de Be' argued that by taking out an insurance policy to protect the shipment in Gori's own name, Gori acknowledged that it had a property interest in the wine, thereby suggesting that it had agreed to ensure the safe transport of the wine. Sept. Tr. at 12:1-12.

18. The Court finds that Ca' de Be' overstated the evidence on these points and did not meet its burden of establishing that Gori acted as anything other than a freight forwarder in arranging for the shipment of the wine. As discussed above, aside from the somewhat equivocal testimony of Mr. Faggi, who stated that at a trade show or at the time of an earlier shipment he was told by a Gori representative (whom he could not identify) that Gori would ensure the safe transport of Plaintiff's wine, there was no other evidence presented from which the Court could conclude that such a promise was either made or intended by Gori or could be connected to the wine shipment at issue. June Tr. at 37:13-14.

19. The distinction between freight forwarders and carriers is well settled, and a statement made at a trade show, unrelated to a specific shipment, in an attempt to sell services was more likely "mere puffing" than an actual term of a specific contract. See Prima U.S. Inc.,

223 F.3d at 129-30. Additionally, other than Mr. Faggi's recollection and characterization of the terms of the oral contract, there was no evidence from which the Court could discern a meeting of the minds in terms of Gori assuming obligations with respect to ensuring the safe delivery of the wine from the vineyard to its ultimate destination. Although counsel for Ca' de Be' argued that the existence of an insurance policy corroborates Mr. Faggi's somewhat spotty recollection of the terms of the agreement between Ca' de Be' and Gori, there was no evidence presented at trial that Ca' de Be' itself was not an insured or an additional named insured on any policy.[7]

20. In addition to the absence of evidence with respect to the parties' intent, the terms of the Sea Waybill lead the Court to conclude that the Gori Defendants acted as a freight forwarder and not a carrier. The Sea Waybill, which was issued by Zim Israeli, names the

[7] The role played by insurance in this case was somewhat unconventional. The parties presented the case with the apparent mutual agreement that the only insurance policy that actually existed likely excluded coverage for the loss as it appeared to have happened. Indeed, as another curious feature of this case, no party actually presented evidence as to how, why or when the wine froze. All parties agreed the wine could not have frozen on the road trip from Port Elizabeth to Philadelphia. They also appeared satisfied that the temperature instructions were correct, that the temperature was correctly set when the wine was initially containerized, and that they do not know whether the ship's refrigeration equipment was functioning properly or whether at some point someone confused Fahrenheit and Celius when adjusting the temperature. They do agree that wine freezes at approximately 22 degrees Fahrenheit. In terms of insurance, the Court notes that although Ca' de Be' included copies of an insurance policy with its trial exhibits, these exhibits were not offered or admitted at trial. Presumably because Mr. Faggi had not previously asked for copies of the policy, no specific questions with respect to the policy were posed to him at trial, nor were any insurance-related questions posed to Mr. Maher during his testimony. Moreover, regardless of these facts, the policies which were provided did not clearly establish whether a temperature fluctuation resulting from an equipment malfunction (as opposed to natural fluctuations in temperature or "human error") was or was not excluded from coverage. Thus, the insurance policy was ultimately used in this case as possibly circumstantial evidence that Gori thought it was responsible for the wine and that that sense of responsibility, in turn, was some evidence of Gori's alleged status as something more than a freight forwarder.

Shipper as "CIV-GIORGIO GORI ***AS AGENTS*** SC Z-2995 ***'FREIGHT FORWARDER,'***" with Ca' de Be' named as the consignee. Trial Ex. D-1 (emphasis added).[8]

21. Further, payment for the freight charge was made directly to Zim Israeli, with only C.O. D. and C.O.D. commission charges allotted to the Gori Defendants. Trial Ex. P-9. This information, when considered in conjunction with the absence of evidence discussed above, leads to the conclusion that Gori acted in the capacity of a freight forwarder, not a carrier. For these reasons, judgment will be entered in favor of the Gori Defendants with respect to this count of the Complaint.

B. Negligence Claim

22. Ca' de Be' also alleges that the Gori Defendants were negligent in failing to exercise due care in connection with the containerization, transportation and refrigeration of the wine. Complaint at ¶ 22. There being no evidence of any negligent act or omission by Gori, Ca' de Be' asserts that the Gori Defendants' negligence may be inferred through the doctrine of res ipsa loquitor.

23. The Pennsylvania Supreme Court has adopted the doctrine of res ipsa loquitor as set forth in the Restatement (Second) Torts. See Gilbert v. Korvette, Inc., 327 A.2d 94, 100-101 (Pa. 1974). In order for res ipsa loquitor to allow for an inference of negligent conduct, a plaintiff must establish that (1) the event that caused the injury is of a kind which ordinarily does

[8] The Court notes that at trial, counsel for the Gori Defendants mistakenly referred to the Sea Waybill as Exhibit D-6. Sept. Tr. at 2:13. However, the Sea Waybill was included as Defendant's Exhibit 1. The Court suspects that counsel had mistakenly looked to the Plaintiff's Exhibits, which included the Sea Waybill as *Plaintiff's* Exhibit 6.

not occur in the absence of negligence; (2) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (3) the indicated negligence is within the scope of the defendant's duty to the plaintiff. Id. at 100. To paraphrase George Washington's observation to his relative, Parke Custis, in June 1798, under res ipsa loquitor conjecture is allowed to be substituted for facts. But the law permits this only under specific conditions, none of which were proven here.

24. Ca' de Be' argues that the Gori Defendants are liable under this theory because the wine was frozen either while it was in the possession of the Gori Defendants or while the Gori Defendant's agent, Zim Israeli, transported the wine. Plaintiff's Trial Memorandum at 16. That is, Ca' de Be' asserts that even if the wine was frozen while it was in the possession of Zim Israeli, the Gori Defendants are liable because Zim Israeli acted as Gori's agent. Id.

25. Ca' de Be's argument with respect to negligence fails because, as discussed above, Ca' de Be' has not established by a preponderance of the evidence that the Gori Defendants bore any duty to maintain, or had any other liability for, the wine during its ocean transportation. As a freight forwarder, the Gori Defendants may be held liable only if Ca' de Be' proves that the Gori Defendants were negligent selecting Zim Israeli Navigation to transport the wine. However, there was no evidence presented at trial to support this claim, and Ca' de Be' suggested none on this point.

26. There was no evidence from which the Court could conclude that the wine was frozen during the time that it was in the actual possession of the Gori Defendants, i.e., as it was being transported from the vineyards in the refrigerated trucks and packed into the container.

Because there was no evidence presented with respect to Gori's intended relationship with Ca' de Be', the Court is unable to conclude that Gori assumed any obligation to ensure that the wine was transported safely across the ocean at the correct temperature.

27. Moreover, to the contrary of what Ca' de Be' posits, the evidence that was presented, by way of the Sea Waybill and the Freight Manifest, suggest that the Gori Defendants' obligation was to act as a freight forwarder and shipping agent on behalf of Ca' de Be'. Thus, the Court disagrees that Zim Israeli acted as an agent for the Gori Defendants. Rather, it appears that the only agency relationship in this case was that the Gori Defendants acted as an agent of limited authority for Ca' de Be'.

28. Ca' de Be' also presented no evidence one way or the other that either establishes or absolves Zim Israeli, a third party, of negligent acts that might have been the cause of the wine freezing. For example, there was no evidence at trial that any malfunction or negligent act with respect to maintaining the container either happened or was the responsibility of the Gori Defendants, of Zim Israeli, or any other third party. Thus, Ca' de Be' cannot fulfill the requirements of the res ipsa loquitor doctrine and cannot connect Gori to any negligence otherwise.

29. For all of these reasons, the Court finds that the Gori Defendants are not liable for negligence, and judgment in favor of the Gori Defendants shall be entered with respect to this count of the Complaint.

C. Negligent Misrepresentation Claim

30. Finally, Ca' de Be' contends that the Gori Defendants are liable for negligent

misrepresentation for their failure to notify Ca' de Be' that the terms of the insurance policy had changed to exclude coverage for fluctuations in temperature. The Pennsylvania Supreme Court has adopted the definition of negligent misrepresentation set forth in the Restatement of Torts, which states that "[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." RESTATEMENT (SECOND) OF TORTS § 552; see also Rempel v. Nationwide Ins. Co., 370 A.2d 366, 367 (Pa. 1977) (adopting Restatement (First) of Torts definition).[9]

31. Pennsylvania courts have interpreted the Restatement test to require proof of the following specific elements: (1) misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. Heritage Surveyors & Engineers, Inc. v. National Penn Bank, 801 A.2d 1248, 1252 (Pa. Super. Ct. 2002). Additionally, for a negligent representation claim to lie, a duty must be owed by one party to the other. (Id.)

32. The elements of negligent misrepresentation differ from those of intentional

[9] Rempel, which was decided in 1977, makes reference to the Restatement (First) of Torts. The Restatement (Second) of Torts was issued that same year, and, aside from adding language with respect to duties imposed upon individuals who have a public duty to disperse information, the substantive elements of the provision at issue remain essentially the same.

misrepresentation in that the misrepresentation involved must be with respect to a material fact and the speaker need not know that his or her words are untrue, but must have failed to reasonably investigate the truth of these words. Heritage Surveyors & Engineers, Inc., 801 A.2d at 1252. Additionally, negligent misrepresentation may be proven by a preponderance of the evidence, as opposed to the clear and convincing evidence required to establish intentional misrepresentation or fraud. Fort Washington Resources, Inc. v. Tannen, 858 F. Supp. 455, 461 (E.D. Pa. 1994).

33. Ca' de Be' argues that its claim for negligent misrepresentation must succeed because (1) wine is clearly a temperature-sensitive commodity, (2) Gori certainly was aware of this and that the insurance policy exclusion would, therefore, be a material consideration for both Ca' de Be' and Gori, and (3) that Gori knew it had left a materially false impression with Ca' de Be' regarding the scope of the insurance coverage. Plaintiff's Trial Memorandum at 13.

34. Although Ca' de Be's arguments, if proven, might have supported judgment in favor of Ca' de Be', the Court finds that Ca' de Be' again did not meet its burden of proving the elements of negligent misrepresentation at trial. At the summary judgment stage of this litigation, the Court denied summary judgment in favor of the Gori Defendants on this issue because there were then sufficient factual disputes as to leave open the question of whether "Gori intended to induce Ca' de Be' to utilize its services by its non-disclosure . . . [which] is a [closer] call." Summary Judgment Memorandum and Order at 14. Thus, at trial there needed to be some evidence with respect to whether it was more likely than not that Gori intended to induce Ca' de Be' to continue using its services by failing to inform Ca' de Be' about the alleged policy

modification. However, at trial, no such evidence was presented, and this claim essentially died on the vine with no witnesses or exhibits addressing the issue.

35. As discussed above, no representative of Gori was questioned with respect to what was intended in negotiating the terms for the services. Although it is clear that some insurance policy was issued, no actual policy was presented at trial, nor was any witness – from Ca' de Be' or Gori – questioned about the specific details of the policy.[10] Moreover, Mr. Faggi, who presumably testified as to his best recollection, was mistaken as to who it was he actually spoke with at the trade show regarding the services Gori could or would provide, thus underscoring the Court's skepticism about his at best rudimentary recollections on the entire discussion.[11] According to the evidence presented, this was the only time the topic of insurance was ever addressed by the parties.

36. The evidence that was presented, in conjunction with the absence of evidence regarding the meaning Gori intended in setting forth the terms of the freight forwarding agreement, is not sufficient to demonstrate a claim for negligent misrepresentation. For these reasons, judgment in favor of Gori will be entered as to this claim.

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[10] In fact, at trial, counsel for Ca' de Be' acknowledged that his reference to the insurance policy was really to demonstrate an indicia of Gori's acknowledgment that it had accepted the risk associated with shipping the wine, and was not to argue that the policy existed or did not or what it covered or should have covered. Sept. Tr. at 11:8-11.

[11] At trial, Mr. Faggi testified that at the trade show booth he met Mr. Giorgio Gori himself. June Tr. at 35:8. However, James G. Maher, the sole Gori representative who testified, later stated that Mr. Gori, who was the original owner of the company, died in the late 1950s or early 1960s, that the company was sold shortly thereafter and that no other member of the Gori family continued to work there. Sept. Tr. at 4:12-19; 5:4-6. Thus, Mr. Faggi must have been mistaken in thinking that he met with the owner of the company in 1998 or 1999.

CONCLUSION

The Court recognizes that Ca' de Be' itself did not cause the wine to freeze and certainly would have expected its wine to arrive in a state suitable for consumption. However, at this trial the parties, the causes of action and the available facts did not blend in a way to permit Ca' de Be' to recover. For the reasons discussed above, the Court concludes that Ca' de Be' did not meet its burden of proving any of the remaining claims against the Gori Defendants by a preponderance of the evidence. Accordingly, judgment will be entered in favor of Giorgio Gori, Srl, and Giorgio Gori U.S.A., Inc. d/b/a Danzas Gori on all counts of the Complaint. An appropriate Order follows.

/S/_____
Gene E.K. Pratter
United States District Judge

January 4, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CA' DE BE' IMPORTS, INC.,	**:**	**CIVIL ACTION**
Plaintiff	**:**	
v.	**:**	
	:	
ZIM-AMERICAN ISRAELI SHIPPING	**:**	
COMPANY, INC., GIORGIO GORI,	**:**	
SRL, AND GIORGIO GORI USA, INC.	**:**	**No. 02-6710**

O R D E R

AND NOW, this 4th day of January, 2006, upon consideration of the evidence presented at the trial of this matter, it is hereby **ORDERED** that judgment is **ENTERED** in favor of the Defendants, Giorgio Gori SRL and Giorgio Gori USA, Inc. and against Plaintiff, Ca' de Be' Imports, Inc.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
United States District Judge